

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 7
AKORN HOLDINGS COMPANY LLC, <i>et</i>	:	Case No. 23-10253 (KBO)
<i>al.</i> <sup>1</sup>	:	(Jointly Administered)
Debtors.	:	
	:	

**LIMITED OBJECTION AND RESERVATION OF RIGHTS REGARDING NOTICE OF  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES THAT MAY BE ASSUMED  
AND ASSIGNED, PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE, IN  
CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF  
THE DEBTORS' ASSETS, AND THE PROPOSED CURE AMOUNTS**

Thermo Fisher Scientific, Inc., Fisher Scientific Company, L.L.C., Patheon Manufacturing Services, L.L.C., Patheon Pharmaceuticals, Inc., Patheon, Inc., and PPD Development, LP (f/k/a PPD Development L.L.C.) *et al.*, (collectively, the “**Thermo Fisher Entities**”), by and through their undersigned counsel, file this *Limited Objection and Reservation of Rights Regarding Notice of Executory Contracts and Unexpired Leases That May Be Assumed and Assigned, Pursuant to Section 365 of the Bankruptcy Code, in Connection With the Sale of Substantially All of the Debtors’ Assets, and the Proposed Cure Amounts* [Doc. No. 146], and state as follows.

**BACKGROUND**

1. On February 23, 2023 (the “**Petition Date**”), the Debtors each filed a voluntary petition for relief under chapter 7 of title 11 of the United States Code, 11 U.S.C. § 101, *et seq.* (the “**Bankruptcy Code**”).

2. George L. Miller was appointed as the Chapter 7 Trustee (the “**Trustee**”).

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<sup>1</sup> The Debtors in these chapter 7 cases, along with the last four digits of their federal tax identification numbers, and cases numbers are Akorn Holding Company LLC (9190), Case No. 23-10253 (KBO); Akorn Intermediate Company LLC (6123), Case No. 23-10254 (KBO); and Akorn Operating Company LLC (6184), Case No. 23-10255. The Debtors’ headquarters is located at 5605 CenterPoint Court, Gurnee, IL 60031.

3. While the Debtors' United States operations have ceased, non-debtor Akorn AG, the Debtors' Swiss affiliate, continues to operate. Akorn AG is wholly owned by non-debtor Akorn International S.á.r.l, which is based Luxembourg. In turn, Akorn International S.á.r.l is wholly owned by Debtor Akorn Operating Company LLC ("**Akorn Operating**").

4. The Thermo Fisher Entities and various of the Debtors are parties to certain supply, service, and purchase agreements (collectively the "**TFS Agreements**").

5. The Thermo Fisher Entities had provided goods and services to Akorn Operating to, and for a short time after, the Petition Date. The Estate is obligated to the Thermo Fisher Entities with respect to both pre-petition and post-petition goods and services.

6. On March 7, 2023, the Thermo Fisher Entities sent a reclamation demand letter to the Trustee with respect to invoiced goods, in the amount of \$161,238.53, delivered within 45 days prior to the Petition Date. Of that amount, \$104,191.74 was delivered in the 20 days prior to the petition date and is entitled to an administrative claim under § 503(b)(9) of the Bankruptcy Code. Product was shipped after the Petition Date totaling \$4,210.15, before the claimants had notice of the Bankruptcy, which were delivered to the Debtors' business. Prior to the sale process, the Trustee acknowledged the reclamation demand and offered to return the reclaimed goods provided that Thermo Fisher had to go onsite to retrieve them at the supervision of the Trustee or his agents, but those goods remain at the Debtors' properties.

7. Following the Petition Date, the Trustee began preparing a process for the sale of substantially all assets of the Debtors. As per the Bid Procedures Motion (as defined *infra*), as part of this sale process, the Debtors engaged Greenhill & Co. ("**Greenhill**") to market the assets with the exception of certain excluded assets and hold an auction.

8. On April 20, 2023, the Trustee filed his Motion for Entry of (I) an Order (A) Approving Bidding Procedures in Connection with Sale of Substantially All of the Estates' Assets, (B) Scheduling an Auction and Hearing to Consider the Proposed Sale, and (C) Approving the Form and Manner of Notice Thereof; and (II) an Order (A) Approving the Sale, (B) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases, and (C) Granting Certain Related Relief (the "**Bid Procedures Motion**"), wherein the Trustee sought the Court approval of a sale of substantially all assets of the Debtors. [Doc. No. 106.]

9. The Thermo Fisher Entities filed a Limited Objection and Reservation of Rights. [Doc. No. 126]

10. On April 28, 2023, the Court issued an Order approving the Bid Procedures Motion (the "**Bid Procedures Order**"). [Doc. No. 137]

11. In accordance with the Bid Procedures Order, the Trustee filed the Notice of Executory Contracts and Unexpired Leases That May Be Assumed and Assigned, Pursuant to Section 365 of the Bankruptcy Code, in Connection With the Sale of Substantially All of the Debtors' Assets, and the Proposed Cure Amounts [Doc. No. 146] (the "**Cure Notice**"), which identified (i) those executory contracts and unexpired leases that may be assumed and assigned to a potential purchaser in connection with the Trustee's sale of the Debtor's assets (the "**Executory Contracts and Unexpired Leases**"); and (ii) the proposed cure amount to cure any and all defaults associated with each Executory Contract and Unexpired Lease (the "**Cure Amount**"). [Doc. No. 146]

12. The Cure Notice identified certain TFS Agreements as follows:

Exhibit 1 Page Number	Thermo Fisher Entity Counter Party	Contract Name	Debtor Party	Cure Amount
13 of 21	Patheon Pharmaceuticals Inc.	Single Page Transfer Price Confirmation dated January	Akorn Operating Company, LLC	\$0.00

<b>Exhibit 1 Page Number</b>	<b>Thermo Fisher Entity Counter Party</b>	<b>Contract Name</b>	<b>Debtor Party</b>	<b>Cure Amount</b>
		10, 2020 re 2020 Transfer Price - Bentyle 2mL Ampule		
13 of 21	Patheon Pharmaceuticals, Inc.	Statement of Work as of May 18, 2021 between Akorn Operating Company	Akorn Operating Company LLC	\$0.00
13 of 21	Patheon Pharmaceuticals, Inc.	Change Order to Statement of Work as of February 3, 2022 between Akorn Operating Company LLC and Patheon Pharmaceuticals Inc.	Akorn Operating Company LLC	\$0.00
14 of 21	Patheon Pharmaceuticals, Inc.	Price Adjustment to Manufacturing Services Agreement as of January 1, 2021 between Patheon Pharmaceuticals Inc. and Verspharm Incorporated	Akorn Operating Company LLC	\$0.00
14 of 21	Patheon Pharmaceuticals, Inc.	Manufacturing Services Agreement as of October 1, 2007 between Patheon Pharmaceuticals Inc. and Verspharm Incorporated	Akorn Operating Company LLC	\$0.00
14 of 21	Patheon Pharmaceuticals, Inc.	First Amendment to Manufacturing Services Agreement as of July 8, 2013 between Patheon Pharmaceuticals Inc. and Verspharm Incorporated dated October 1, 2007	Akorn Operating Company LLC	\$0.00
14 of 21	Patheon Pharmaceuticals, Inc.	Manufacturing Services Agreement as of March 9, 2022 between Patheon Pharmaceuticals Inc. and Verspharm Incorporated and successor Akorn Operating Company LLC dated October 1, 2007 and amended July 8, 2013	Akorn Operating Company LLC	\$0.00
15 of 21	PPD Development L.P.	FTEs to Support Commercial Activities as of January 1, 2020 to September 30, 2021 between Akorn Operating Company LLC d.b.a. Akorn, Inc. and PPD Development L.P.	Akorn Operating Company LLC	\$29,979.19
15 of 21	PPD Development L.P.	Open Agreement for Commerical Release Testing as of October 1, 2021 to December 31, 2022 between Akorn Operating Company LLC and PPD Development L.P.	Akorn Operating Company LLC	\$29,979.19

13. The Thermo Fisher Entities file this Reservation of Rights with respect to the Cure Notice and Cure Amounts.

#### **LIMITED OBJECTION**

14. The Thermo Fisher Entities acknowledge that multiple TFS Agreements were identified in the Cure Notice as Executory Contracts and Unexpired Leases to be assumed and assigned, along with the proposed Cure Amount with respect to each.

15. However, the Cure Notice does not identify with sufficient specificity the particular TFS Agreement to which each Cure Amount relates.

16. Indeed, after careful analysis, the Thermo Fisher Entities are unable to identify the specific TFS Agreements identified in Exhibit 1 of the Cure Notice because of the lack of specificity regarding those Agreements.

17. Counsel for the Thermo Fisher Entities communicated with counsel for the Chapter 7 Trustee and requested copies of, and more information regarding, the Executory Contracts and Unexpired Leases of the Thermo Fisher Entities referenced in the Cure Notice.

18. As of the date of this Reservation of Rights, such information has not been provided to counsel for the Thermo Fisher Entities.

19. Unless and until the Thermo Fisher Entities receive the copies of the contracts being designated—or at least additional identification information, such as the exact contract numbers—the Thermo Fisher Entities cannot confirm that the Cure Amounts are accurate. Certainly as for the contracts listed with no cure amount (and thus a \$0 amount per the Notice) that is not likely accurate. For example, the Patheon Pharmaceuticals, Inc. contracts listings provide for a zero dollar cure for each of those agreements, when in fact under certain Patheon

agreements there is \$105,418.26 due and owing under a contract. Accordingly the cure amount would be \$105,418.26—and not \$0.

20. Accordingly, the Thermo Fisher Entities object to the Cure Notice and Cure Amounts.

21. Within a reasonable time after the Trustee provides the required information and copies, the Thermo Fisher Entities will either supplement or withdraw the cure amounts objection.

### **RESERVATION OF RIGHTS**

22. The Thermo Fisher Entities reserve their rights with respect to the Cure Notice, and the Cure Amount owed, with respect to any TFS Agreement identified as an Executory Contract and Unexpired Lease in the Cure Notice, including but not limited to, the right to object to the stated Cure Amount upon the receipt and review of additional, sufficient information about the Executory Contracts and Unexpired Leases listed on the Cure Notice, and the right to enforce their rights and remedies under applicable law or as otherwise authorized by the Court.

23. Furthermore, in the event that the TFS Agreements listed on the Cure Notice are assigned to a Successful Bidder, the Thermo Fisher Entities reserve all of their rights under the TFS Agreements, including, but not limited to, the right to object to an attempted assumption and assignment of any contract which the Thermo Fisher Entities in good faith believe is no longer executory, the right to object to assignment of a contract that is not assignable, and the right to be provided adequate assurance that the Successful Bidder can fully perform, on both a financial basis and an operational basis with respect to compliance with applicable laws, regulations and licensing requirements, including *inter alia*, the Foreign Corrupt Practices Act, the Federal Food, Drug and Cosmetic Act, the FDA Current Good Manufacturing Practice (CGMP) regulations, or

any other regulatory or legal requirements of any governmental entity (for example, the FDA, HHS, CMS or DEA).

24. The Thermo Fisher Entities reserve the right to amend or supplement the foregoing objections, to join in other objections filed and to further revise and/or amend the foregoing, or to enforce other rights and remedies under applicable law, or as otherwise authorized by the Court.

WHEREFORE, the Thermo Fisher Entities respectfully request that this Honorable Court issue an Order directing the Debtors and the Trustee to provide the Thermo Fisher Entities with copies of the TFS Agreements identified on the Cure Notice, and granting such other and further relief as the Court deems just and proper.

Dated: May 15, 2023  
Wilmington, Delaware

Respectfully submitted,

HILLER LAW, LLC

/s/ Adam Hiller

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